BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

T-MOBILE USA, INC. Respondent and COMMUNICATION WORKERS OF AMERICA, AFL-CIO and COMMUNICATION WORKERS OF AMERICA, LOCAL 1298, AFL-CIO Charging Parties	:	Case Nos.: 01-CA-123183 01-CA-129976 01-CA-140752 Administrative Law Judge: Raymond P. Green JUNE 19, 2015

BRIEF OF THE CHARGING PARTIES

1. INTRODUCTION

This case concerns a large, multi-national corporation that has been unable to adapt to the decision by a small unit of employees to be represented by the Communication Workers of America ("the CWA" or "the Union"). First, the Respondent published and disseminated an Employee Handbook that is wholly at odds with its collective bargaining agreement with the CWA. More specifically, the Handbook's attendance policy conflicts with the seniority provision of the collective bargaining agreement, and more importantly, the Handbook forcefully, prominently and unambiguously informs all employees that they are at will employees subject to termination without cause. By so doing, Respondent undermined the seniority system and repudiated the critical "just cause" provision of the collective bargaining agreement,

thereby conveying the message to these bargaining unit employees that maintaining membership in the Union is a futile act. Second, the Respondent, without bothering to notify the Union, changed the notice requirements for use of paid time off, in violation of the parties' collective bargaining agreement. Third, the Respondent has failed and has refused to meet with the Union to negotiate a successor collective bargaining agreement. The General Counsel has alleged that the above actions were in violation of sections 8(d) and 8(a)(1) and (5) of the Act.

This brief is submitted on behalf of the CWA in support of the allegations of the Amended Consolidated Complaint.

2. FACTS

Nearly every material fact in this case is undisputed. Details regarding the identity of the parties, the procedural history of this matter and the applicability of the Act are set forth in a Stipulation – Joint Exhibit 1 ¶¶1-5.

A. Background

The Respondent, T-Mobile USA Inc. (hereinafter "T-Mobile," "the Employer" and/or "the Company"), is a telecommunications company that employs twenty (20) employees in certain technician and handler roles in the State of Connecticut (Jt. Ex. 1 ¶¶1, 6, 7). This includes approximately six (6) former employees of MetroPCS who were added to the bargaining unit in December 2013 as the result of an integration (Jt. Ex. 1 ¶¶7).

Since August 2, 2011, T-Mobile has recognized the Union as the exclusive collective bargaining representative for these employees (Jt. Ex. 1 ¶¶6, 7). After nearly a year of negotiations, the parties reached a collective bargaining agreement in July

2012 ("the Connecticut Agreement"), which was in effect by its terms from July 31, 2012, through May 31, 2014 (Jt. Ex. 1 ¶¶10, 11 and Ex. C).[1] That Agreement was executed by Area Director Mark Appel, for the Company,[2] and Local 1298 President William H. Henderson III and CWA Representative Paul Bouchard, for the Union (Jt. Ex. 1 ¶11 and Ex. C). That Agreement includes the following provisions:

Article III – Management Rights

> Section 1 Except as expressly set forth in this Agreement, the Company has and retains the exclusive right authority and discretion to manage the business, . . . to suspend, discipline, discharge, demote or take any other disciplinary action ***for just cause***; . . .

(Emphasis added) (hereinafter the "just cause provision") (Jt. Ex. 1, Ex. C, p. 3).

Article IX – Seniority and Layoff

> . . .
> Section 5 Seniority shall be lost for the following reasons:
> (a) If an employee voluntarily leaves the employ of the Employer;
> (b) If an employee is terminated for cause;
> (c) . . .
> (d) . . .

(hereinafter the "seniority provisions") (Jt. Ex. 1, Ex. C, p. 7).

Article XVIII – Benefits

> Bargaining unit employees shall be eligible to participate in. . .paid time off ...on the same basis and terms as other employees working at the Company... During the term of this Agreement, the Employer shall have the right, in its sole discretion to alter or eliminate entirely these benefits currently offered provided such revisions match those of employees outside the bargaining unit.
>
> ***The Company will give notice to the Union of any such changes. . . .***

(Emphasis added) (hereinafter the "notice provision") (Jt. Ex. 1, Ex. C, p. 15).

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[1] Exhibit C to Joint Exhibit 1 and General Counsel's Exhibit 2 are the same document. All testimony during the hearing referred to G.C. Ex. 2 (see e.g., Tr. p. 33).

[2] Mark Appel is neither the Company President, nor the chief executive officer (Jt. Ex. 1 ¶11; Tr. p. 35).

B. Issuance of the Employee Handbook in January 2014

On or about January 16, 2014, while the Connecticut Agreement was still in effect, and shortly after the six (6) MetroPCS employees had been merged into the branch unit, T-Mobile electronically published a revised Employee Handbook to all of its employees, including the twenty (20) bargaining unit employees in Connecticut (Jt. Ex. 1 ¶14 and Ex. F).[3] In the introductory remarks, the Handbook provides, "Just so we are clear, this Handbook supersedes any previous versions of the T-Mobile Employee Handbook as well as those handbooks and policies in use by predecessor companies or those companies acquired by or merged into TMUS.[4] The Company reserves the right to update or change this Employee Handbook at its sole discretion" (Jt. Ex. 1, Ex. F, p. 6). Among other provisions, the Handbook included the following:

> Employment at Will
> Employment at TMUS is "at will," which means that it is not for any specific duration, and that an employee of the Company may terminate the employment relationship at any time, for any reason, with or without notice. No one except the President or Chief Executive Office [sic] of TMUS has the authority to change any employee's at will employment status, to make any agreement that an employee will be employed by TMUS for any set period of time, or to make any other promises or commitments that are contrary to this policy of at will employment. For any such agreement, promise or commitment to be binding on the Company, and to be valid and enforceable against it, that agreement, promise or commitment must be part of a written contract signed by an employee and the President or Chief Executive Officer of TMUS and, if applicable, have the approval of the Compensation Committee.

(hereinafter the "at will policy") (Jt. Ex. 1, Ex. F p. 6).

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[3] Exhibit F to Joint Exhibit 1 and General Counsel's Exhibit 3 are the same document. All testimony during the hearing referred to G.C. Ex. 3 (see e.g., Tr. p. 35).

[4] "TMUS" is the acronym used throughout the Handbook for "T-Mobile US" (See, Jt. Ex. 1, Ex. F p. 6). The reference to "predecessor companies and companies acquired by or merged into TMUS" clearly refers to MetroPCS.

> Attendance
> . . .
> Generally, if an employee is absent from work for 3 or more days without giving notice, the employee may be deemed to have abandoned TMUS employment.
> . . .

(hereinafter the "attendance policy") (Jt. Ex. 1, Ex. F p. 11).

At the same time, T-Mobile electronically published a document announcing and promoting the revision of the Handbook (G.C. Ex. 4; Tr. pp. 37-39). That document was sent to all employees and expressly noted that the "revised content applies to all employees..." (G.C. Ex. 4). It also clarified, "California employees will also notice the retirement of the California Supplement. Rather than maintaining a separate document, the state-specific content has been integrated into the enterprise document. Please note that Puerto Rico employees will continue to have a separate handbook supplement" (G.C. Ex. 4; Tr. pp. 38, 40). There is no such separate handbook supplement for the Connecticut unionized employees (Tr. pp. 38-39).

As that announcement noted, two days later T-Mobile issued another document to its employees which further promoted the revised Handbook, and reiterated – (1) that it "applies to all employees of TMUS," and (2) that "California no longer has separate supplement, but Puerto Rico still does" (G.C. Ex. 5). No separate email or other notification was sent to the Connecticut bargaining unit employees explaining that the attendance and at will policies do not apply to the Connecticut unionized employees or that the Handbook is superseded in any way by the Connecticut Agreement (Tr. pp. 38, 40-41).

During the hearing in this case, it was also revealed that, upon becoming employed with the Company, all T-Mobile employees must sign certain forms, including,

but not limited to, an "Employee Acknowledgement," that reinforce and repeat that employment with the Company is at will (Tr. pp. 86-90, 92; See also, Charging Party Exhibit 1, attached hereto in accordance with Judge Green's statements during the hearing, Tr. pp. 92-93). More specifically, in the Employee Acknowledgement form, employees must explicitly acknowledge:

- My employment is at will to the fullest extent allowed by law, is entered into voluntarily, and may be terminated by the Company or me at any time, with or without reason, cause or notice.
- The foregoing agreement concerning my employment at will status and the Company's right to determine and modify the terms and conditions of employment is the sole and entire agreement between me and T-Mobile concerning the duration of my employment and the circumstances under which the terms and conditions of my employment may change or my employment may be terminated.

(Chg. Pty. Ex. 1).

The Handbook's attendance policy totally undermines the seniority provision of the Connecticut Agreement insofar as it adds a new circumstance under which a bargaining unit employee will lose his/her seniority – absent any showing of cause as is required by the parties' collective bargaining agreement (Tr. pp. 36-37) Additionally, the Handbook's very prominent at will policy, as reiterated and emphasized by the Company's accompanying announcements and/or forms like the Employee Acknowledgement, totally contradicts the just cause provision of the Management Rights Section in the Connecticut Agreement. Moreover, as the Connecticut Agreement was not signed by T-Mobile's President or the CEO, the Handbook explicitly and unambiguously informs employees that neither the seniority provision, nor the just cause provision of the Connecticut Agreement, is binding on T-Mobile.

C. Changes to the Notice Requirements for Use of Paid Time Off

Under the terms of the Connecticut Agreement, employees' eligibility for certain benefits including, but not limited to, for paid time off (hereinafter "PTO"), is established by Article XVIII – Benefits (Jt. Ex. 1, Ex. C, p. 15; Tr. pp. 42-43). Though the Company retained the right to alter or eliminate the benefits currently offered, the Connecticut Agreement expressly provided that, "The Company will give notice to the Union of any such changes" (Jt. Ex. 1, Ex. C, p. 15; Tr. pp. 34, 43).

For nearly all of the time since the Connecticut Agreement went into effect on July 31, 2012, Connecticut bargaining unit employees were required to give advance notice for using PTO as follows:

1 Day = 24 Hour Advanced Notice
2 Days = 72 Hour Advanced Notice
3 or more Days = 5 Business Days Notice

Jt. Ex. 1, Ex. I;[5] Tr. p. 42). Those advance notice requirements were published to the Connecticut unionized employees via an email sent just five (5) weeks into the term of the Connecticut Agreement from Connecticut Market Manager David Karpinski (Jt. Ex. 1 ¶¶ 9, 18 and Ex. I; Tr. pp. 42-43).

On May 29, 2014, just days before the expiration of the Connecticut Agreement, and while the parties were actively engaged in preparing for negotiations over a successor agreement (See, Tr. pp. 49-53; G.C. Exs. 9, 10, 11, 12, 13), Mr. Karpinski sent another email unilaterally changing the advance notice requirements for using PTO

[5] Exhibit I to Joint Exhibit 1 and General Counsel's Exhibit 7 are the same document. All testimony during the hearing referred to G.C. Ex. 7 (see e.g., Tr. pp. 41-42).

(Jt. Ex. 1 ¶16 and Ex. H; [6] Tr. pp. 42-43, 45-46). In particular, the advance notice requirements were changed as follows:

1 Day = 24 Hour Advanced Notice
2 Days = 72 Hour Advanced Notice
3 Days = 5 Business Days Notice
4 or more Days = 2 Week's Notice

Jt. Ex. 1, Ex. H; Tr. pp. 42, 80, 91). While this change to the policy did not change the amount or the accrual rate of PTO (Jt. Ex. 1 ¶17; Tr. p. 80), it did constrain how much PTO can be used (Tr. p. 91) and imposed an entirely new limitation upon employees when they want to use more than a few days of PTO.

When Mr. Karpinski sent this email on May 29, 2014, the Union had not been given any prior notice of the change to the advance notice requirements (Tr. p. 44). Rather, the Union only became aware of the change when Connecticut bargaining unit employees forwarded Mr. Karpinski's email to the Union the following day (Tr. pp. 43-44, 48; G.C. Ex. 8).[7]

D. Suspension of Negotiations for a Successor Agreement

On or about April 2, 2014, T-Mobile received notice that the Union wanted to bargain a successor to the Connecticut Agreement which was set to expire on May 31, 2014 (Jt. Ex. 1 ¶¶20-21, Ex. J). The chief spokesperson for the Union for all bargaining issues was International Representative Patrick O'Neil (Tr. 31-32, 48-49), while the

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[6] Exhibit H to Joint Exhibit 1 and General Counsel's Exhibit 6 are the same document. All testimony during the hearing referred to G.C. Ex. 6 (see e.g., Tr. p. 42).

[7] When Mr. Karpinski sent his May 29, 2014, email to the twenty (20) bargaining unit employees in Connecticut, it may have been received by up to two (2) employees who also served as stewards for the Union (See, Tr. pp. 45-46, 81-82; Jt. Ex. 1 ¶8). However, at all times relevant to this case, whenever the Employer has sought to modify a policy or implement a new policy, it has always done so by providing timely notification of same to the Union – through the bargaining agent for the unit, who as of May 2014 was Patrick O'Neil (Tr. pp. 31-32, 46). It has never gone just to a steward to deliver such communications to the Union (Tr. p. 46; See also, Tr. pp. 63-64, 70).

chief spokesperson for the Company was Attorney Mark Theodore (Tr. 49). Mr. O'Neil and Attorney Theodore then began exchanging information in preparation for negotiations over a successor agreement (Tr. 49-53, G.C. Exs. 9, 10, 11, 12, 13).[8] It is undisputed that, after the expiration of the Connecticut Agreement and well into the summer months, both parties were willing to bargain over a successor agreement (Tr. pp. 54-56). Dates for negotiations were set for three days in June, and when those days were cancelled, three new dates were set in August and the parties met and began bargaining directly on August 19 and 20, 2014 (Jt. Ex. 1 ¶¶24, 25 and Ex. K; Tr. pp. 54-57; G.C. Ex. 15). On August 21, 2014, the parties entered into an interim agreement by which the Connecticut bargaining unit employees would be eligible for planned wage adjustments notwithstanding that the expired Connecticut Agreement had capped wage increases for those employees (Jt. Ex. 1 ¶26 and Ex. L; Tr. p. 55).

Then on October 8, 2014, T-Mobile notified the Union that it was "suspend[ing] bargaining" (Jt. Ex. 1 ¶28 and Ex. M;[9] Tr. pp. 58-59). In so doing, the Employer relied upon a petition for decertification which had been filed regarding the Connecticut bargaining unit some six and a half (6 ½) months earlier, on or about March 28, 2014, which the Employer claimed evidenced a loss by the Union of majority status (Jt. Ex. 1 ¶¶15, 28, and Exs. G and M; Tr. pp. 50, 59).[10]

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[8] During the same time, the parties, and these same agents, were also involved in bargaining over an agreement for a separate bargaining unit involving MetroPCS retail sales employees in Harlem (Tr. pp. 54, 56-57).

[9] Exhibit M to Joint Exhibit 1 and General Counsel's Exhibit 17 are the same document. All testimony during the hearing referred to G.C. Ex. 17 (see e.g., Tr. pp. 58-59).

[10] The alleged showing of interest of the employees in support of the petition for decertification included signatures from thirteen (13) of the twenty (20) Connecticut bargaining unit employees – including all six (6) of the former MetroPCS employees who were added to the Connecticut unit in or about December 2013 (Tr. pp. 93-96; Resp. Ex. 3; Jt. Ex. 1 ¶7).

At no time prior to the October 8th suspension of bargaining – including, but not limited to, when it learned that the decertification petition had been filed, nor during the preparations for negotiations in Spring and Summer 2014, nor during the August 2014 bargaining sessions – nor at any time since October 8, 2014, has T-Mobile ever withdrawn its recognition of the Union as the collective bargaining representative for the Connecticut bargaining unit employees (Jt. Ex. 1 ¶¶ 28, 32 and see also Exs. M, N, O;[11] Tr. pp. 54-55, 56, 59). Indeed, since the decertification petition was filed in late March 2014, and notwithstanding T-Mobile's unilateral suspension of bargaining over a successor agreement on October 8, 2014, the parties have continued to bargain and/or have successfully negotiated regarding several other matters,[12] including as related to (1) a grievance filed on July 26, 2014, over the termination of Connecticut bargaining unit member Joseph Papa (Jt. Ex. 1 ¶23; Tr. pp. 58, 83-84; G.C. Ex. 16); (2) a package that included changes to the fleet policy along with a potential stock grant for employees, about which agreement was reached on October 29, 2014 (Jt. Ex. 1 ¶¶ 29, 30; Tr. pp. 62-65, 78-79; G.C. Exs. 20, 21, 22); (3) changes to the mileage reporting and tax implications for personal use of company vehicles by employees, about which agreement was reached on November 21, 2014 (Jt. Ex. 1 ¶31; Tr. pp. 65-67, 78-79; G.C. Exs. 23, 24, 25, 26); and (4) follow up information requests related to the August 21, 2014, interim agreement regarding planned wage adjustments, in response to which

[11] Exhibit N and O to Joint Exhibit 1 and General Counsel's Exhibits 18 and 19 are the same documents, respectively. All testimony during the hearing referred to G.C. Exs. 18 and 19 (see e.g., Tr. pp. 60-61).

[12] As was already discussed above at pages 8-9 *supra*, by providing the Union with requested information in preparation for negotiations, by scheduling bargaining sessions throughout the Summer and then meeting to bargain directly with the Union in August, and thereby indicating a clear intention to negotiate over a successor agreement, the Employer readily recognized the Union as the bargaining representative for these Connecticut employees, even as to those matters directly related to the successor agreement, for more than six (6) months after the petition for decertification was filed (from at least April 2, 2014 through October 8, 2014).

the information was provided on January 5, 2015 (Jt. Ex. 1 ¶¶ 29; Tr. pp. 55, 68-69; G.C. Ex. 27).

In addition, even after the suspension of negotiations on October 8, 2014, T-Mobile expressly agreed to continue to abide by the terms of the expired Connecticut Agreement as it was obligated to do and, at least through the time of the hearing in this matter, the Company continued to routinely communicate with Mr. O'Neil as the Union's representative regarding matters affecting the Connecticut bargaining unit employees, including as recently as May 1, 2015 regarding the termination of another Connecticut bargaining unit employee (Jt. Ex. 1 ¶28, 33 and Exs. M, N, O; Tr. pp. 60-61, 84-85). Finally, as of the date of the parties' stipulation in this case on May 8, 2015, "the Company still recognizes the CWA as the collective bargaining representative" for the Connecticut bargaining unit employees (Jt. Ex. 1 ¶32).

3. ARGUMENT

A. Respondent's Publication of the Handbook Undermines the Union and Repudiates the Contract

T-Mobile's distribution of the Handbook to bargaining unit employees represented by the Union and covered by the Connecticut Agreement violates the Act in several respects. First, the Employer violated section 8(a)(1) of the Act by conveying to the Connecticut bargaining unit employees, in a forceful manner, that representation by the Union was futile. The Board has long held that an employer violates section 8(a)(1) by communicating the message that forming a union is a futile act. Trane Co., 137 N.L.R.B. 1506, 1510 (1962); Marathon Metallic Building Co., 224 N.L.R.B. 121, 124 (1976); American Telecommunications Corp., 249 N.L.R.B. 1135, 1136 (1980); Madison

Industries, Inc., 290 N.L.R.B. 1226, 1230 (1988). As the Board expressly noted in Trane Co.,

> Such an attitude is not only inconsistent with good-faith bargaining, it is also reasonably calculated to have a coercive effect upon employees...There is no more effective way to dissuade employees from voting for a collective-bargaining representative than to tell them that their votes for such a representative will avail them nothing.

137 N.L.R.B. at 1510-11. The issuance of the Handbook to the Connecticut bargaining unit communicated precisely that message. It informed these employees that the Employer has taken from them the most significant benefits that they had been able to achieve through collective bargaining: seniority rights and the job security that comes with the just cause provision. The point that the Union can achieve nothing is reinforced by the Company's repeated statements (1) first, in the introduction to the Handbook that the Employer has the right to make further changes "at its sole discretion," that is to say, without bargaining; (2) then, in the cautionary language of the at will policy that "no one except the President or C[EO]" has any authority to change an employee's at will status and that any promises otherwise are void unless they are signed by the "President or C[EO]," which of course the Connecticut Agreement was not; (3) also, in the documents that the Company sent out along with the Handbook, that the Handbook applies to "all employees," while noting possible exceptions in California and Puerto Rico, but not in Connecticut; and (4) finally, by the words the employees are forced to agree to as their own in forms like the Employee Acknowledgement, that his/her at will status is "to the fullest extent allowed by law" and that such "agreement" is the "sole and entire agreement...concerning...the terms and conditions of [his/her] employment."

The timing of the issuance of the Handbook, only a few months before the contract expiration and just weeks before the "open period," sent a strong message that the protections afforded by the Union contract meant nothing, that the Employer can do whatever it wants, and that the employees should abandon the Union. The primary accomplishment by the Union in its collective bargaining on behalf of these employees was to win seniority rights and just cause protection for them. As the time for negotiations for a new contract was approaching, the Employer denounced that win by informing the Connecticut employees that T-Mobile does not consider itself bound by any such limitations, and thereby completely undermined the status of the Union as an effective bargaining agent in the very first moments that the Union could be vulnerable to decertification. Indeed, shortly thereafter, a decertification petition was in fact filed – and perhaps tellingly, it was signed by one hundred percent (100%) of the employees who had only recently been added to the unit and had had no prior contact with the Union. The Employer thus informed the employees in no uncertain terms that it was free to eliminate any legal protections that the Union had achieved in bargaining.

The Employer also violated section 8(a)(5)and section 8(d) of the Act by issuing the Handbook. By publishing the Handbook's attendance and at will policies and repudiating its obligation to recognize the seniority rights and job security of employees, T-Mobile unilaterally modified both the seniority and the just cause provisions of the Connecticut Agreement. By issuing a Handbook that so modifies mandatory subjects of bargaining, the Employer committed a unilateral change that "amounts to a rejection of the collective-bargaining process...." United Cerebral Palsy of New York City, 347 N.L.R.B. 603, 606 (2006).

The proposition that an employer in a collective bargaining relationship is prohibited from making "unilateral changes" in terms and conditions of employment is so deeply entrenched in NLRB practice and so frequently applied that the underlying principles are easily overlooked. The rule approved by the Supreme Court in NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), is that unilateral changes in terms and conditions of employment are inherently inconsistent with the duty to bargain. "We hold that an employer's unilateral change in conditions of employment under negotiation is ... a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal." Id. at 743, 50 LRRM at 2180.

The General Counsel has established a case that Respondent violated §8(a)(5) by issuing the Handbook, in particular, the attendance policy and the at will policy therein. There is no dispute that seniority and the protection afforded by the just cause provision are both terms or conditions of employment for the Connecticut bargaining unit employees. By distributing the Handbook when it did, the Respondent announced that it would no longer adhere to the seniority system as it was set forth in the Connecticut Agreement, nor would it be bound by the restriction on its power to terminate employees. There can be little question that seniority rights and just cause protection each constitute a term and condition of employment (see e.g., respectively, Ohio Valley Hospital and Ohio Nurses Association, 324 N.L.R.B. 23, 24 (1997), citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1952), and Windstream Corp., 352 N.L.R.B. 44, 50 (2008), as adopted by 355 N.L.R.B. 600 (2010)), and that such benefits were promised explicitly by the terms of the Connecticut Agreement.

It is also clear that the Handbook's attendance and at will policies *changed* each of those benefits. The attendance policy added a new circumstance whereby a bargaining unit member would lose his/her seniority – where he/she is absent for 3 or more days without giving notice, regardless of whether or not there was cause for such absence without notice. The at will policy, on its face, eliminated the just cause protection entirely. In implementing these changes, T-Mobile acted unilaterally and in the face of contrary contract language. The Employer presumably will contend that it did not alter or repudiate these policies since the Connecticut Agreement was legally binding upon the Company and the publication of the Handbook repudiating the seniority rights and job security would not have been recognized as legally binding by the courts or by an arbitrator. Repudiation of a collective bargaining agreement need not be legally effective to constitute an unfair labor practice. The violation occurs, not when legal action is concluded, but when an employer announces to its employees that it does not consider itself to be bound by the contract and does not intend to adhere to the provisions thereof. That is precisely what T-Mobile did in this case. Thus, the seniority provision and the just cause provision each constituted a term or condition of employment which was unilaterally changed and repudiated by T-Mobile.

B. The Management Rights Clause Offers No Defense to the Repudiation of the Connecticut Agreement

In defense of its position, the Respondent relies upon Section 3 of the Management Rights Clause of the Connecticut Agreement to suggest that the Handbook's attendance and at will policies did not in fact *change* the seniority or just cause provisions. Section 3 provides as follows:

> It is the intent of the parties hereto that there is no conflict between the terms of this Agreement and any state or federal government rule, regulation or other law, policy, procedure, rules of regulations affecting conditions of employment. If such conflict is found to exist, this collective bargaining agreement shall take precedence, to the extent permitted by law.

(Jt. Ex. 1, Ex. C, p. 4).

The Employer apparently argues that this language limits its right to implement a policy that conflicts with the Connecticut Agreement, thus negating any apparent repudiation of the seniority or just cause provisions. But the fact that the repudiation may not be legally effective is no defense. On the contrary, repudiation of a collective bargaining agreement is an unfair labor practice precisely because it is not legally permissible. Therefore, the fact that the contract contains a provision stating that the contract takes precedence is irrelevant to whether the Employer committed an unfair labor practice. The unfair labor practice was committed when the Respondent informed the Connecticut bargaining unit employees that their seniority could be lost in case of certain absence and that their contract did not provide the just cause protection for their jobs when, in fact, the contract does not automatically allow for a loss of seniority in such circumstance and the contract does provide for such just cause protection. These announcements constitute repudiation in and of themselves. The fact that the announcements are ineffective because the repudiation may not ultimately be legally sound is not a defense. The essence of the violation lies in telling employees that the Respondent rejected its contractual obligations.

The fact that the Connecticut Agreement was not signed by T-Mobile's President or CEO reinforces the repudiation of the contract. Assuming that Section 3 of the Management Rights clause is read to state that the Agreement takes precedence over

the Handbook, which as discussed below the Union does not concede, the Handbook indicates that the collective bargaining agreement is itself invalid and unenforceable because it is not signed by anyone with the requisite authority to bind the Respondent. By publishing this Handbook, the Employer is clearly communicating to the Connecticut employees that T-Mobile is not bound by the seniority or just cause provisions of the collective bargaining agreement. This is reemphasized by the Employer's requirement that all employees sign an Employee Acknowledgement form stating that they "understand and acknowledge" that "[t]he foregoing agreement concerning my employment at will status and the Company's right to determine and modify the terms and conditions of employment is the *sole and entire agreement* between me and T-Mobile concerning the duration of my employment and the circumstances under which the terms and conditions of my employment may change or my employment may be terminated." (Emphasis added).

Furthermore, the Union does not agree that Section 3 of the Management Rights is applicable to this situation. In context, it is clear that, by its own language, Section 3 does not refer to the Employer's own policies, but rather, it refers to "state or federal government" rules, regulations, laws, policies, etc. This interpretation is only furthered by the inclusion of the final clause of the last sentence – "to the extent permitted by law," – since that clause implicitly acknowledges that, in reality, there are limitations under which a collective bargaining agreement can take precedence over such government regulations and laws. In any event, any reliance by the Respondent on Section 3 is entirely circular. The Respondent has informed the bargaining unit that it is not bound by the collective bargaining agreement because it was not signed by the

President or the CEO. This repudiation applies equally to Section 3 of the Management Rights clause.

C. Respondent's Imposition of New Notice Requirements for Using PTO Constituted a Unilateral Change in a Benefit

The Respondent also violated section 8(a)(5) of the Act when Mr. Karpinski unilaterally changed the advance notice that the Connecticut bargaining unit employees must provide when using PTO.

As already discussed in Part 3.A. supra, such a unilateral change is tantamount to a refusal to bargain. See, Katz, 369 U.S. at 743; United Cerebral Palsy of New York City, 347 N.L.R.B. at 606; Daily News of Los Angeles, 315 N.L.R.B. at 1237-38. By the very terms of the Connecticut Agreement, PTO is a "benefit" within the meaning of the Agreement that cannot be altered or eliminated unless and until the Company "give[s] notice to the Union of any such changes" and it is a mandatory subject of bargaining. Pepsi America Inc., 339 N.L.R.B. 986 (2003). It is beyond dispute that such notice did not occur here. The Union, specifically Mr. O'Neil, did not even become aware of the imposition of the additional advance notice requirements until the day after the same was published to the Connecticut bargaining unit.

Any suggestion that notice to the Union was accomplished because the email announcing the newest restrictions for use of PTO was received by two employees who also may have been serving as stewards is baseless. First, there is no evidence that those two employees/stewards were authorized by the Union to receive notices from the Employer on behalf of the Union. More importantly, though, the past practice evidence is abundantly clear – in all other similar instances T-Mobile served such notice upon the Union – via Mr. O'Neil, not upon the stewards.

Finally, to the extent that the Respondent contends that the PTO benefit was not changed by Mr. Karpinski because the amount of and/or accrual rate remained constant, this argument is equally flawed. Imposing new and more restrictive limitations under which the Connecticut employees could use their PTO has significant impact upon how much, when, how often, and even whether the employee can take advantage of such benefit at all. Constraining a benefit so much obviously constitutes a change. And while T-Mobile retained the right to make such a change – they agreed to provide the Union with notice of such a change. The failure to do so is a plain section 8(a)(5) violation.

D. Respondent's Suspension of Negotiations for a Successor Agreement Constitutes a Failure and Refusal to Bargain

Upon expiration of a collective bargaining agreement, a union is presumed to retain its majority status. Gene's Bus Co., 357 N.L.R.B. No. 85 (2011), sl. op. at 4; NLRB v. Curtin Matheson Co., 494 U.S. 775, 794 (1990). An employer is obligated to continue bargaining with the incumbent union unless it is able to provide objective evidence that a union has actually lost majority support. Levitz Furniture Co. of the Pacific, 333 N.L.R.B. 717 (2001). Even if an employer has evidence of such a loss of support, it may not refuse to bargain if it has committed unfair labor practices that have a tendency to cause a loss of support for the union. Gene's Bus Co., *supra*, citing Bunting Bearings Corp., 349 N.L.R.B. 1070, 1071-72; Lee Lumber & Building Material Corp., 322 N.L.R.B. 175, 177 (1996), enfd. in rel. part, 117 F.3d 1454 (D.C. Cir. 1997) (Lee Lumber II).

The Respondent presented a decertification petition dated March 28, 2014, signed by a majority of the bargaining unit employees, including all of those hired in

from MetroPCS. The Respondent cannot justify its refusal to bargain on the basis of these signatures because it had committed unfair labor practices that have a tendency to undermine the Union. In particular, repudiation of the seniority and just cause provisions are such unfair labor practices.

To determine whether there is a causal relationship between an employer's unfair labor practices and employee disaffection with a union, the Board considers four factors:

> (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the Union; and (4) the effect of the unlawful conduct on employee morale, organizational activities and membership in the union.

Gene's Bus Co., *supra*, sl.op. at 4, quoting Master Slack Corp., 271 N.L.R.B. 78, 84 (1984). The Master Slack test is an objective one that does not allow questioning employees as to their reasons for rejecting the Union. Saint Gobain Abrasives, Inc., 342 N.L.R.B. 434 at n.2 (2004). This test mandates a finding that the evidence is tainted by the Respondent's unfair labor practices.

The first factor, timing, strongly supports a causal link between the unfair labor practices and employee dissatisfaction. While the Respondent did not refuse to bargain until October, the decertification petition was signed in March, shortly after the Employer issued its new Handbook. The impact of this timing was magnified by the fact that the Handbook was issued just a few weeks after six (6) employees were potentially added to the bargaining unit. Thus, the timing strongly favors finding a causal relationship.

The nature of the unfair labor practices also favors dismissal. The Board has held that unilateral changes impacting the entire bargaining unit have a strong tendency

to undermine employee support for a union. "'It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees.'" Priority One Services, 331 N.L.R.B. at 1527, quoting Page Litho, Inc., 311 N.L.R.B. 881 (1993). The Board continued, "This is so because unilateral action by an employer 'detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression that a union is powerless.'" Ibid, quoting Carpenter Sprinkler Corp. v. NLRB, 605 F.2d 60, 64-65 (2d Cir. 1979). Repudiating a contract sends an even more compelling message that the Union is powerless. The Region also found that the Handbook violated Section 8(a)(1) by sending the message that collective bargaining by these employees is a futile act, because the Respondent is not bound to honor the terms of a collective bargaining agreement. Such statements of futility were found to support rejection of the employer's evidence of employees' dissatisfaction in Gene's Bus, *supra*. Thus, this factor also supports a finding of a causal connection.

The unfair labor practices in this case also have a strong tendency to generate dissatisfaction with the Union. The most significant achievements by the Union in the collective bargaining agreement were to establish seniority for the bargaining unit members and to alter the at will relationship to one in which the employees can be terminated only for cause. By issuing a Handbook that repudiates those contractual commitments, the Respondent sent a strong message that the Union cannot protect the employees. That message is reinforced by the statement that a contract promising these protections is not valid unless signed by T-Mobile's President or CEO. This is

tantamount to a statement that the Connecticut Agreement is not binding on the Employer, rendering the Union meaningless. Thus, this factor also supports finding a causal connection.

In summary, the first three factors of the Master Slack test strongly point to the conclusion that the Union's alleged loss of majority is tainted by the Respondent's own serious unfair labor practices. Moreover, while a loss of majority status may, under proper circumstances, permit an employer to withdraw recognition from the bargaining agent for its employees, the Employer has not done so in this case. Rather, the Respondent has simply refused to meet since October 8, 2014. It is fundamental that the duty to bargain includes the duty to meet to negotiate a successor collective bargaining agreement. Alle Arecibo Corp., 246 N.L.R.B. 1267 (1987). Therefore, the Respondent is violating section 8(a)(5) of the Act by refusing to meet with the Union.

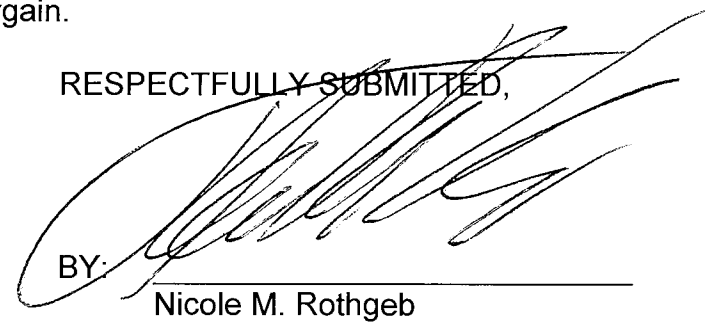
4. CONCLUSION

This record establishes that the Respondent has thrice breached its bargaining obligations. More specifically, by unilaterally issuing and maintaining a Handbook that includes an attendance policy and an at will policy that are in direct contradiction to the seniority and just cause provisions of the Connecticut Agreement, T-Mobile has violated the Act by repudiating those critical provisions and communicating to the Connecticut employees that their unionization is futile. In addition, the sudden and unannounced imposition of additional advance notice requirements for the use of the PTO benefit is an impermissible unilateral change to the terms and conditions of employment of these bargaining unit employees. Lastly, the suspension of negotiations over a successor

agreement, summarily, and despite the fact that the Employer continues to recognize the Union as the bargaining representative, constitutes a failure and refusal to bargain.

The above actions of the Respondent were in violation of sections 8(d) and 8(a)(1) and (5) of the Act. Accordingly, the Respondent should be ordered to restore any benefits to and/or otherwise make whole all employees, if any, who were negatively impacted by the at will policy and/or the PTO notice requirements, to bargain in good faith over these mandatory subjects of bargaining and to resume negotiations and bargain in good faith over a successor agreement for a period of time equal to the period for which it has refused to bargain.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of the Charging Parties was sent via email, on this 19th day of June, 2015 to the following:

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NH04A

EMPLOYEE ACKNOWLEDGEMENT
(for Non-California or Puerto Rico Employees)

Personnel # (if available):	
Last Name:	
First Name:	**MI:**

I understand and acknowledge that the **T-Mobile USA, Inc. ("T-Mobile") Code of Conduct** is available for review on OneVoice at: **Policies>Code of Conduct.**

I further understand and acknowledge that T-Mobile's Employee Handbook ("Handbook") is available for review on OneVoice at: **Policies>Employee Handbook.**

I further understand and acknowledge the following:

- Nothing in the Handbook, Code of Conduct, or other communications, whether written or oral, made at any time, is a promise of specific treatment under any particular set of circumstances, or is intended to or does create an employment contract or other contract of any kind, express or implied, including a contract of continued employment.
- My employment is at will to the fullest extent allowed by law, is entered into voluntarily, and may be terminated by the Company or me at any time, with or without reason, cause or notice.
- The foregoing agreement concerning my employment at will status and the Company's right to determine and modify the terms and conditions of employment is the sole and entire agreement between me and T-Mobile concerning the duration of my employment and the circumstances under which the terms and conditions of my employment may change or my employment may be terminated.

I further understand and acknowledge that T-Mobile is committed to an environment that does not allow conduct that may violate laws and/or T-Mobile's policies (which are often more strict than the law) prohibiting certain forms of discrimination, harassment and retaliation, and that I am responsible for helping to maintain such an environment. I understand and acknowledge that this responsibility includes the following:

- I will not engage in conduct that violates the law and/or T-Mobile's policies, including those set forth in the Code of Conduct.
- It is not always possible for the Company to be aware of all of the conduct of concern to its employees. I must report any conduct that I believe is improper under T-Mobile's Wage-and-Hour/Timekeeping, Equal Employment Opportunity, non-discrimination, non-harassment, non-retaliation and other policies to my management team, another appropriate supervisor or manager and/or a Human Resources representative.
- I must cooperate and participate in any investigation conducted by the Company or its designees related to these issues.

I acknowledge that I have read or will promptly read (or have read to me) the Handbook, Code of Conduct and the policies and procedures that are available to me via OneVoice. I will periodically review the Handbook, the Code of Conduct and the policies and procedures available on OneVoice and ask a Human Resources representative if I have any questions regarding Company policies. I accept full responsibility for familiarizing myself with the contents of the Handbook, Code of Conduct and the other policies and procedures posted on OneVoice.

I acknowledge that if I choose not to read the Handbook, the Code of Conduct and the policies and procedures posted on OneVoice, and any revisions to them, my failure could negatively impact my performance reviews, could result in the forfeiture of my good standing, and/or could result in additional performance improvement action up to and including my dismissal, and that I will still be responsible for complying with their terms. I agree to be bound by the provisions in the Handbook, the Code of Conduct, and the policies and procedures posted on OneVoice.

By my signature, I acknowledge that I have read this receipt (or had it read to me), and that I have received a copy of this receipt.

Signature

Date

Note: If you fail to sign but begin work or continue working for T-Mobile, your continued employment constitutes your implied consent to the terms in this acknowledgement. Your continued work for T-Mobile following any changes to the Employee Handbook, Code of Conduct, and other policies and procedures constitutes your implied consent to such changes.

TO BE SIGNED AND PLACED IN EMPLOYEE PERSONNEL FILE